No. 6421

IN THE

United States Circuit Court of Appeals

9

FOR THE

NINTH CIRCUIT

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a Corporation,

Appellee,

APPELLANT'S BRIEF.

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STATEMENT OF THE CASE.

This action is brought under the Federal Employers' Liability Act for personal injuries received by the appellant while he was employed by the appellee as a hostler's helper in its yards at Colton, California.

On the 25th day of March, 1930, while the appellant was on the top of the dome or oil tank of the

tender of a switch engine supplying fuel oil the hostler who was in charge of the engine left the cab. During this time the engine automatically moved backward causing the appellant to be thrown against the back of the cab of the engine by being struck by the oil beam, or spout, causing appellant's injuries.

The complaint contains two causes of action; one based upon the Federal Employer's Liability Act, and the other upon the violation of the Boiler Inspection Act (R. 1-10).

At the trial of the case the following stipulation was entered into in open court.

> "Mr. DUNNE: If your Honor please, in view of counsel's opening statement we can avoid a lot of trouble and perhaps a lot of documentary evidence by stipulating to certain facts. I will follow counsel's opening statement in offering to stipulate to those facts.
>
> That, in the first place, Colton is a station on the line of the Southern Pacific, and that that station is on a part of the main line of the Southern Pacific, running out of Los Angeles and toward and across the Arizona border. We make no question about that.
>
> Second: That at the station of Colton there is a switch-yard, and that that switch-yard is wholly within the state of California.
>
> Thirdly: That in that switch-yard, and in the normal course of the business of this defendant, switching movements are made which are both interstate and intrastate in character.
>
> Next: That the particular switch-engine in

question was assigned to the Colton yard, and was used indiscriminately, to use counsel's own statement, in interstate and intrastate commerce.

And lastly: That on the day of this accident it had been on the seven o'clock in the morning shift; that that shift terminated at three o'clock in the afternoon normally, but there was a little bit of overtime carrying that particular time to 3:10 or 3:15; at any rate, that shift had been completed, the switching crew had brought the engine in and placed it on the roundhouse receiving track, and had left it and the hostler had taken charge of it." (R. 28-29)

"Mr. DUNNE: Yes, we will add that to the stipulation, that on the morning of March 25, 1930, the day of the accident, this locomotive, 2604 was engaged from 7 A. M. until a little after 3 in the afternoon in doing switching operations in the Colton yard and that on that day, and in the course of those switching operations was handling indiscrimately interstate and intrastate commerce, that is, one job, which was one and then it would do another job, which was the other. Now, do you want it as to what happened after the accident?

Mr. McCUE: The next shift.

Mr. DUNN: Now, as to the next shift, I will stipulate to the fact, with the objection that it is immaterial, irrelevant, and incompetent, that on the next shift, from eleven o'clock P. M. on the 25th of March, 1930, until the end of that shift, which would be 7 o'clock A. M. on March 26th, 1930, that locomotive was again engaged in similar service.

Mr. McCUE: With that statement, I do not think it is necessary for you to produce the records and incumber this record.

Mr. DUNNE: We are straight on this, Mr. McCue, that at the time this accident happened, however, the engine had finished its work on the morning shift.

Mr. MCCUE: I thing the evidence clearly shows what took place; that is, as far as shift is concerned, as far as the engine performing any service itself was concerned in the nature of switching that day, when it was turned over to the hostler I apprehend that it had finished its shift.

Mr. DUNNE: That is right.

Mr. MCCUE: With that statement, I waive the production of the car records. I would like to recall Mr. Walton for a few questions I overlooked asking him yesterday."

At the close of the appellant's case the appellee moved for a non suit, which motion was sustained by the Court (R. 55) and judgment was rendered dismissing appellant's cause of action, (R. 25) from which judgment this appeal it taken.

ASSIGNMENT OF ERRORS.

The plaintiff in the above entitled case says there is manifest error in the record herein committed by the trial court and alleges the following as such:

I.

The Court erred in striking out the answer of plaintiff in response to the following questions, to-wit:

"Mr. McCue: Mr. Walton, did you know what the duties of the hostler in the Colton yard were during the period covered by this matter? A. Yes.

Q. You may state what they were.

Mr. Dunne: I make the objection that it calls for the conclusion of the witness and it is without foundation, this man is not a hostler, no foundation is shown.

The Court: I will overrule the objection. Exception.

A. The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stoping an engine while I was doing my work on the engine, until I got through.

Mr. Dunne: I move to strike that out, your Honor, it is simply an argument from the witness.

The Court: The motion is granted; exception noted." (R. 50)

II.

The Court erred in granting and sustaining the defendant's motion for a nonsuit.

III.

The Court erred in entering judgment dismissing plaintiff's complaint and awarding costs to the defendant. (R. 60-61)

ARGUMENT.

Assignment of Error I.

Walton was asked "did you know what the duties of the hostler in the Colton yard were during the period covered by this matter" and he answered "Yes". Then he was asked to state what they were. Objection was made to this question which was overruled by the Court. Thereupon the witness answered "The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stopping an engine while I was doing my work on the engine, until I got through." The counsel for appellant moved to strike the answer out on the grounds that there was an argument from the witness. The motion was granted and exceptions noted. (R. 50)

Just what theory the court had for this ruling is beyond our comprehension. The evidence showed that Walton was a hostler's assistant; that he had worked in the yards with the hostler for a considerable length of time and that prior to his entering the duties of assistant hostler he was in the yards doing general work in connection with the round house and engines. He stated that he knew what the duties of a hostler were and he was a competent witness. The testimony was very material in determining whether or not the hostler was negligent in leaving his post of duty in the engine cab at the throttle and leaving the engine unattended.

Moore vs. Grand Trunk Ry. Co., (Vt.) 108 Att. 334.

No argument is necessary to convince this Court that the testimony was proper and that it was error for the Court to strike it from the records. The ground of the motion to strike this evidence was, "it was an argument from the witness" (R. 50). On the contrary, the evidence was a clear statement of fact as to what were the duties of a hostler, by one who knew the duties of a hostler.

Common knowledge dictates that a locomotive engine, under steam, is a dangerous instrumentality when uncontrolled; that when the hostler left it, unattended in such condition that it "kicked back" of its own violation, his act was an act of gross negligence. Walton's statement of the duties of a hostler at the time and place of the accident, seems to be a common sense rule. Since his evidence in this respect was not impeached by any fact in the case, it was competent and material; the court was in error in striking it from the record.

Section 1870 of the California Code of Civil Procedure among other things provides.

> "One who is skilled in a trade or occupation may not only testify as to facts, but are sometimes permitted to give their opinions as experts."

Vallejo R. R. Co. vs. Reed Orchard Co., 169 Cal. 570.

The duties of the hostler are either regulated by rule or by practice and custom, consequently, Walton being familiar with the rule and custom of the yard was a competent witness to testify to what the duties of the hostler were and the striking out of this evidence was clear error.

Assignment of Errors II and III.

We will present the questions arising under these assignments under one head.

The two questions involved under these assignments are—

(a) Does the stipulation set out in the statement of facts in this brief show that the switch engine at the time that plaintiff was injured thereon was an instrumentality of interstate commerce?

(b) Was there sufficient evidence to go to the jury on the question of the violation of the Boiler Inspection Act?

Taking up the first question the stipulation specifically states "that the particular switch engine in question was assigned to the Colton yard and was used indiscriminately, to use counsel's own statement, in interstate and intrastate commerce."

It seems to us that the stipulation forecloses any question as to the switch engine being engaged

in interstate commerce at the time the appellant was injured. It stipulates that the engine was assigned to the Colton yard and that it was used indiscriminately in the switching of both kinds of commerce. An engine when it is once assigned to a class of commerce remains in that class until it is taken out of the assignment.

> "The engine, No. 3835, on which deceased last worked was used in hauling interstate trains. It was not withdrawn from service. See *Walsh vs. N. Y., N. H. & H. R. R. Co.,* 233 U. S. 1; *Erie Railroad vs. Szary,* 253 U. S. 86; cf; *Industrial Commission vs. Davis,* 259 U. S. 182. But petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it. But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act. *Erie Railroad vs. Szary, supra; Erie Railroad Co. vs. Winfield,* 244 U. S. 170, 173; see *North Carolina R. R. Co. vs. Zachary,* 232 U. S. 248, 260, *Hoyer vs. Central Railroad Co. of New Jersey,* 255 Fed. 493, 496, 497.
>
> *N. Y. Central Ry. Co. vs. Marcone,* 181 U. S. 345, 50 S. Ct. 29."

The stipulation stipulates the fact that the shift for which the engine was being prepared by Wal-

ton commenced at 11 o'clock P. M. on March 25, 1930, the day that Walton was injured, and the end of that shift was 7 o'clock A. M. the following morning, March 26, 1930; that during that shift the locomotive was engaged in similar service. Not only does the stipulation say that the engine in question, being No. 2604, was regularly assigned to the Colton yard, where it switched indiscriminately both characters of commerce, but it also stipulates the fact that the very shift for which the appellant was preparing said engine was the switching of both kinds of commerce, which brings the engine clearly and beyond any question as being a locomotive engaged in interstate commerce.

In the case of *Erie R. Co. vs. Van Buskirk,* 1 F. (2nd) 70, the court said:

> "The facts relating to the nature of the employment of Van Buskirk, the description of the location, and the manner in which the accident occurred have been so fully stated in the opinions on the prior writs of error (see *Erie Railroad vs. Van Buskirk,* 228 Fed. 489, 143 C. C. A. 71, and *Van Buskirk vs. Erie Railroad Co.* (C. C. A.) 279 Fed. 622) that a detailed restatement would be superfluous. Evidence upon the prior trials was held sufficient to show that the engine under Van Buskirk's charge as hostler was an instrumentality of interstate commerce, being employed indiscriminately in shifting cars used in interstate and intrastate commerce, and that his employment in taking charge of the shifting engine in the interval between the completion of one day's work and the beginning of another day's work, in taking it to the ash pit to be cleaned

> of ashes and supplied with coal, and taking it to the respective points for its supply of sand and water, was employment in interstate commerce."

The Supreme Court in the case of *N. Y. Central R. R. vs. Carr,* 238 U. S. page 260 of the opinion said:

> "But the matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *St. Louis &c. Ry. vs. Seale,* 229 U. S. 156; *North Carolina R. R. vs. Zachary,* 232 U. S. 248. This case is within the principle of those two decisions

A switch engine assigned to a terminal yard and which switches indiscriminately interstate and intrastate commerce is engaged in interstate commerce.

> "The engine was admittedly an instrumentality of interstate commerce, and when Van Buskirk took charge of it, to have it supplied with coal, sand and water, he was engaged in interstate commerce. *Pederson vs. Delaware, Lackawanna & Western Railroad Company,* 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914 C. 153; *Erie Railroad Co. vs. Winfield,* 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057."

Van Buskirk vs. Erie Ry. Co., 279 F. 624.

Under the settled law, engine No. 2604 upon which appellant was injured was engaged in interstate commerce at the time of his injuries. It had been assigned as a switch engine at the Colton yard. At the time of plaintiff's injuries, he was preparing it for the next shift. The service as stipulated it was to perform was a *similar service* to what it had performed on the day of the injury. Which makes the case a stronger one than the Van Buskirk case. There is no authority to the contrary.

N. Y. Cent. Ry. Co. vs. Marcone;
Erie Ry. Co. vs. Collins; and
Erie Ry. Co. vs. Szary, supra, as well as the *Van Buskirk case*

are decisive of the case upon the question that Walton was engaged in interstate commerce at the time of his injuries. The proof of the fact was by stipulation, which leaves no chance for controversy. Consequently, as a matter of law, the appellant was engaged in interstate commerce at the time of his injury.

Th engine being assigned to yard work where it switched and handled indiscriminately both intrastate and interstate commerce, it was an instrumentality of interstate commerce.

Salvo vs. N. Y. C. Ry. Co., 216 App. Div. 592, 215 N. Y. 645;
N. Y. C. Ry. Co. vs. Carr, 238 U. S, 260, 35 S. Ct. 780;
Southern Ry. Co. vs. Peters, 60 S. 611, 194 Ala. 780.

In the lower court counsel for appellee pressed the contention that because engine No. 2604 was not actually engaged in interstate commerce at the moment of the injury that the Federal Employers' Liability Act did not apply and he succeeded in convincing the Court of the correctness of his contention.

Probably one of the earliest cases incidentally involving the question is the case of *Illinois Central R. R. vs. Behrens,* 233 U. S. 473, decided in 1914. The Supreme Court in its opinion at page 477 stated:

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

It will be noted that the Court in the above entitled case held that the plaintiff could not recover because at the time of the injury he was engaged in moving several cars all loaded with intrastate freight from one part of the city to another and

that it was not a service of interstate commerce and that the injury resulting in death was not within the statute. (P. 478)

Again referring to the quotation above, the Court said:

> "We entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress."

Upon a cursory reading of this case the conclusion may be drawn that the case is against the position we take, but upon a proper construction the demarkation is quite clear as it is plain that the Supreme Court held that if the injury occurred while the crew was in the course of its general work the statute would apply, but when the crew was engaged in moving interstate cars that the moving of such interstate cars was in no way involved with interstate commerce. When we apply the case to the facts in the instant case we will find that the appellant when injured was engaged in the course of his *general work* in preparing an instrumentality which was at the time actually in interstate commerce and for the express purpose of preparing that instrumentality, the engine, for a continuation of service that was in both intra and interstate commerce. Then when we apply the later decisions heretofore quoted that an engine when assigned to a particular kind of commerce remains in such service until it is withdrawn, as held in

N. Y. Central Railroad Co. vs. Marcone, supra, and the holding in the Van Buskirk case and the cases cited.

In the Behrens case, the Supreme Court citing from *Pedersen vs. Delaware, Lackawanna & Western Railroad Co.,* 229 U. S. 146, said:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

Then applying the laws laid down in the Behrens case to the effect that when the crew was engaged in its *general work* for the switching both intra and interstate cars, the statute would apply, and on the other hand, when the crew was enaged in a specific service that dealt solely with the handling of intrastate cars, the statute did not apply.

The instrumentality here were cars in intrastate commerce that were being moved. Consequently, we must distinguish the difference between an instrumentality which was being actually prepared for service in interstate commerce, and shifting of cars which are not a part of interstate commerce, and though it would appear that the demarkation drawn by the Supreme Court in this case is rather close, yet the distinction is clearly shown, and the Behrens case instead of being an authority against us is an authority in favor of our contention.

In the Behrens case, the cars that were being moved by the engine upon which Behrens was killed,

were not moved in an ordinary switching operation, on the contrary, they were being hauled from one part of the City of New Orleans to another part of that city. It must be assumed from what the Court said, that there was evidence in the case showing that "the course of the general work" of the switching crew was confined to switching operations in the yards of the company. Had Behrens been killed while his engine was engaged in performing the *"general work"* of switching, through the negligence of the defendant, the action would have been within the statute. But when he was enaged in moving intrastate cars to another part of the city, he was outside of the general work of a switching crew; therefore, he was performing a service distinct and separate from switching operations which was merely in intrastate commerce.

The holding of the Supreme Court in this case is that a switch engine which switches indiscriminately interstate and intrastate commerce is an instrumentality of interstate commerce, and that a crew while performing such service is engaged in interstate commerce.

Under all the cases holding, that in order to recover under the statute the injured person must have, at the time of the injury, been engaged in interstate commerce, when properly construed and analyzed, it will be seen that there is no case that holds that when an employee is injured while in the course of his general work in preparing an instrumentality of interstate commerce that he cannot re-

cover, and the law as laid down in the cases that we have cited, seems to us to be so clear, and the further fact that the later cases of the Supreme Court show a trend of lessening the fine points of demarkation where the instrumentality is so closely connected with interstate commerce that there can be no reasonable division made, the statute applies.

DOES THE RECORD SHOW SUFFICIENT EVIDENCE OF THE VIOLATION OF THE BOILER INSPECTION ACT TO CARRY THE CASE TO THE JURY.

A leaky throttle used by an interstate railroad is a violation of the Act.

> Sec. 23, 45 U. S. C. A. 790;
> *Davis vs. Reynolds,* 280 F. 366;
> *Spokane Ry. Co. vs. Campbell,* 217 F. 518; 241 U. S. 497, 36 S. Ct. 683

Under the stipulation appellee is an interstate railroad (R. 28).

That the engine moved automatically or of its own volition, is admitted.

The witness, Orth, an experienced engineer, testified:

> "Such an engine as No. 2604 when the reverse lever is on center and the throttle is shut off or closed, and there is air on it, it would not move of its own volition if on a grade that is .53 of (38) 1% if it had the brakes set. I don't believe it would move if the air was released and the throttle shut off; on such a grade as you

mention. When the engine is standing upon a location similar to that you have described and the throttle is closed that engine would not move backwards so that the spout that goes down into the manhole would be thrown out of place. That engine with the throttle closed and the grade being as you have stated it to be (.53 of 1%) a leaky throttle would cause the engine to move of its own volition.

Q. On such a grade, would you state whether or not the engine would not move of its own volition unless it did have a leaky throttle.

A. Leaky throttle.

Q. That is true is it? A. Yes."

The Witness, Askew, testified:

"Assuming that the throttle and other appurtenances of the engine are in proper working order and the air is off, the engine will not move of its own volition.

If an engine of this character moved backwards, or kicked backwards, I could tell you why it did that. A leaky throttle would be the main thing."

From this evidence as well as the evidence of Walton and the circumstances surrounding the case, the jury could well have drawn the inference that a leaky throttle was the cause of the engine moving automatically.

It must be remembered that this appeal is from a judgment of non-suit.

"Upon a motion for a non-suit it must be assumed that plaintiff is entitled to every fair inference therefrom."

Shandoan vs. C. N. & O. T. P. Ry. Co., 220 F. 68;
Hotel Woodward Co vs. Ford Motor Co., 258 F. 325.

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence deduced, must be considered as facts proven in favor of plaintiff."

"Where the evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the one most favorable to plaintiff."

Rabe vs. W. U. Telegraph Co., 198 Cal. 294.

The evidence clearly shows, appellant an able-bodied man of 32 years of age, without any fault of his, was so seriously and permanently injured that he is an invalid and will be crippled for life, by the negligence of and violation of the Boiler Inspection Act by appellee. While the injuries of appellant are not involved upon this appeal, yet, they are proper to be considered as showing a meritorious cause of action, calling for substantial damages, which ought to have appealed to the trial court as warranting a submission of the case to the jury.

The judgment is a miscarriage of justice and the case ought to be reversed.

Respectfully submitted,

THOMAS F. MCCUE,

Attorney for Appellant.